

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:

Review of the Section 251 Unbundling
Obligations for Incumbent Local Exchange
Carriers

CC Docket No. 01-338

Implementation of the Local Competition
Provisions of the Telecommunications Act of
1996

CC Docket No. 96-98

Deployment of Wireline Services Offering
Advanced Telecommunications Capability

CC Docket No. 98-147

COMMENTS OF SBC ON PETITIONS FOR RECONSIDERATION

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SUMMARY

The Commission should grant the petitions for clarification and/or partial reconsideration filed by BellSouth, SureWest Communications, and the US Internet Industry Association, and should clarify or modify its unbundling rules to ensure that the rules are consistent with its policy determinations and achieve the Commission's goal of promoting broadband investment and deployment. In particular, the Commission should limit the obligation to unbundle enterprise dark fiber loops only to those loops that were deployed as of the effective date of the *Triennial Review Order*, clarify that an ILEC has no obligation to reconfigure its packet network facilities to provide TDM capability where it has not already deployed such capability, and clarify that network upgrades do not constitute a disruption or degradation of TDM capability. Failure to make these clarifications or rule changes will create unwarranted barriers to deployment of advanced, broadband services to all Americans, contrary to the express goals of the Act.

The Commission also should grant BellSouth's petition as to BOC obligations under section 271 of the Act. The Supreme Court, the D.C. Circuit, and the Commission have affirmed that mandatory unbundling has costs. Accordingly, once a determination is made under section 251 that competitors are not impaired without access to a particular item, the Commission should not require BOCs to continue to provide that item under section 271. That is the only interpretation of sections 251 and 271 that is faithful to the letter and intent of the Act. Moreover, even if the Commission adheres to its position that section 271 operates independently from section 251, it should clarify that section 271 does not require BOCs to combine or commingle section 271 items. Section 271 contains no requirement to provide any of the items in the Competitive Checklist in any manner other than as discrete components.

The Commission should deny the petitions for reconsideration filed by various wireless carriers. Having failed to conduct a CMRS-specific impairment test, the Commission should not now permit CMRS carriers even greater access to UNEs. CMRS carriers should not be permitted to, on the one hand, claim general entitlement to UNEs under the broad eligibility requirements established by the Commission, while, on the other hand, claim special dispensation from the limits placed on access to those UNEs by the Commission. Assuming that CMRS carriers are entitled to UNEs at all, they should be entitled only to the UNEs to which other carriers are entitled, and they should be subject to the same commingling eligibility requirements as all other carriers.

The Commission also should deny Earthlink's request that the Commission reconsider its line sharing decision. In *USTA*, the D.C. Circuit admonished the Commission for ignoring the fact that cable modem service is the leading broadband product (with other competitive alternatives available), and for imposing a mandatory line sharing regime that would not produce competitive benefits, and it vacated the Commission's line sharing rules. The Commission heeded the D.C. Circuit's admonition and specifically acknowledged in its *Triennial Review Order* the presence of competitive intermodal broadband alternatives and the lack of any enhancement to competition provided by line sharing. The Commission appropriately determined that the costs of line sharing outweigh its benefits and refused to re-impose its vacated line-sharing rules. Accordingly, it should deny Earthlink's request that it reconsider that decision.

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ATTACHMENT A

**Before the
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COMMENTS OF SBC ON PETITIONS FOR RECONSIDERATION

In its *Triennial Review Order*, the Commission drew a fundamental distinction between narrowband and next-generation broadband facilities. On the one hand, the Commission properly recognized that new entrants are not impaired without access to next generation networks and that forced sharing of those networks would reduce incentives of both incumbents and new entrants to deploy them. It accordingly endeavored to minimize unbundling obligations with respect to broadband facilities. On the other hand, the Commission retained virtually blanket unbundling requirements for incumbent LEC narrowband networks, and, indeed, expanded incumbent LEC unbundling obligations by requiring them to provide unbundled network elements (“UNEs”) to wireless carriers. It did so, moreover, without even conducting an impairment analysis with respect to those carriers.

The Commission's decision did, in fact take significant steps towards removing some barriers to broadband deployment. At the same time, however, its decision is ambiguous in some respects and could be construed in ways that, SBC believes, were inconsistent with the Commission's intent. In order truly to promote broadband investment by incumbents and new entrants, the Commission should, as BellSouth and others request, clarify and/or modify its broadband rules. At the same time, the Commission should reject requests by wireless carriers for even broader access to UNEs than they were given in the *Triennial Review Order*. Wireless carriers have shown by their success in the marketplace that they are not impaired without *any* UNEs. The Commission should not compound its error by expanding the availability of UNEs to wireless carriers. The Commission also should deny Earthlink's request that the Commission reinstate its vacated line sharing rules. There is no basis for the Commission to repudiate the mandate of the D.C. Circuit on this issue.

I. THE COMMISSION SHOULD CLARIFY OR RECONSIDER ITS LOOP UNBUNDLING RULES TO ELIMINATE UNWARRANTED BARRIERS TO DEPLOYMENT OF NEXT-GENERATION NETWORKS.

In the *Triennial Review Order*,¹ the Commission determined that ILECs do not have first-mover advantages with respect to, and CLECs thus are not impaired without unbundled access to, ILECs' next generation broadband networks, including new fiber-based loops, packet switching and packetized transmission features of hybrid loops.² The Commission found that the barriers to deployment of new fiber facilities and the potential revenue opportunities from such

¹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et. al.*, CC Docket Nos. 01-338, *et. al.*, FCC 03-36 (Aug. 21, 2003)(“Triennial Review Order”).

² See *Triennial Review Order* ¶¶ 272, 288, 535.

deployment are the same for both ILECs and CLECs.³ The Commission also found that ILEC broadband services and facilities (including fiber and other high-capacity loops) are subject to intermodal competition.⁴ In this context, the Commission concluded that requiring ILECs to unbundle such facilities would impose significant social costs — in particular, elimination of ILEC and CLEC incentives to make risky investments in next generation infrastructure — that offset any potential benefits of unbundling.⁵ The Commission ruled that ILECs therefore need not provide unbundled access to such facilities.⁶

Although the Commission’s new rules provide some welcome relief from unbundling for next generation infrastructure, they could be read to retain unbundling obligations that are inconsistent with the statutory goals of promoting facilities-based competition and investment in next-generation broadband networks. For example, while the new rules (as clarified by the *Errata*) establish that an ILEC need not unbundle lit or dark fiber to an end user’s premise, the *Triennial Review Order* also requires ILECs to unbundle dark fiber loops unless a state commission finds that a self-provisioning trigger has been met or requesting carriers would not be impaired without such loops.⁷ The new rules thus apparently would require ILECs to unbundle newly deployed dark fiber, at least with respect to so-called “enterprise” customers

³ *Id.* ¶ 240.

⁴ *Id.* ¶¶ 245-46.

⁵ *Id.* ¶¶ 211-13.

⁶ *Id.*

⁷ Compare 47 C.F.R. § 51.319(a)(3) with 47 C.F.R. § 51.319(a)(6).

(which are not defined), even though (as the Commission itself concluded) ILECs have no inherent or first-mover advantages in deploying new fiber facilities.⁸

Other sections of the rules likewise could be read to impose obligations that would undermine incentives to invest, or force ILECs to design and deploy next generation facilities in an inefficient manner to accommodate potential CLEC requests for unbundled access to time division multiplexing (TDM) capabilities. For example, CLECs may argue that the rules require an ILEC to deploy TDM facilities and equipment on their next generation packet networks to accommodate CLEC unbundling requests, even where the fiber loops and packet equipment is entirely new investment.⁹

Accordingly, the Commission should grant BellSouth's petition and should expressly limit the obligation to unbundle enterprise dark fiber loops only to those loops that were deployed as of the effective date of the *Triennial Review Order* (ILECs should have no obligation to unbundle any mass market dark fiber loops). It also should grant BellSouth's request for clarification that an ILEC has no obligation to reconfigure its packet network facilities to provide TDM capability where it has not already deployed such capability (*i.e.*, an ILEC is not required to design or modify its packet networks to create TDM capabilities, nor is it required to remove packet equipment to accommodate CLEC unbundling requests); and clarify that network upgrades do not constitute a disruption or degradation of TDM capability.

⁸ See *Triennial Review Order* ¶ 275.

⁹ See *BellSouth Petition* at 16-18 (explaining how CLECs could attempt to distort the Commission's rules in a way that would undermine ILEC incentives to deploy next generation networks) (filed Oct. 2, 2003) ("BellSouth Petition").

A. Only Dark Fiber Loops Deployed As of the Effective Date of the Triennial Review Order Should Be Subject to Unbundling

As BellSouth and others rightly observe, the Commission's dark fiber unbundling rules create substantial and unwarranted barriers to ILEC deployment of advanced services and the fiber-based infrastructure on which they depend.¹⁰ While the rules (as clarified) relieve ILECs of the obligation to unbundle any fiber (lit or dark) to *any* end user's premises (except in overbuild situations where copper is retired),¹¹ they seem to contradict themselves by simultaneously requiring ILECs to unbundle dark fiber loops unless a state commission finds that a self-provisioning trigger has been met or requesting carriers are not impaired without access to such loops.¹² Assuming that section 51.319(a)(6) applies only to enterprise customers,¹³ the rule would still require ILECs to make available even newly deployed dark fiber loop plant to such customers. The rules, thus, at best create enormous uncertainty regarding an ILEC's obligation to unbundle dark fiber loops, which in itself undermines investment incentives and could be construed to require unbundling of the very type of new broadband investment the Commission has concluded would be impeded by unbundling obligations. To the extent they do so, the rules will undermine an ILEC's already tenuous business case for extending fiber deeper into its loop

¹⁰ *BellSouth Petition* at 18-19; *SureWest Petition* at 5.

¹¹ 47 C.F.R. § 51.319(a)(3). The Commission's rules define a "fiber-to-the-home loop" as "a local loop consisting entirely of fiber optic cable, *whether lit or dark*, and serving a [sic] end user's customer premises." *Id.* (emphasis added). The rules further provide that an ILEC need not unbundle fiber-to-the-home loops in either greenfield situations, 47 C.F.R. § 51.319(a)(3)(i), or overbuild situations, except if the ILEC retires the overbuilt copper loop (in which case the ILEC must provide nondiscriminatory access to a transmission path capable of voice grade service over the fiber loop), 47 C.F.R. § 51.319(a)(3)(ii).

¹² *Id.* at § 51.319(6).

¹³ The conclusion that dark fiber loops should be the subject to the trigger analysis appears only in the enterprise loop section of the order.

plant by allowing competitors to free ride on inherently risky investments, and forcing the ILEC to adopt inefficient network designs to permit possible use by multiple carriers.

In adopting section 51.319(a)(6) of its rules, the Commission cited the “high sunk costs” of deploying high-capacity loop facilities and the purported lack of alternatives at specific customer locations.¹⁴ The Commission asserted that these and other barriers, including CLEC’s supposed inability to obtain reasonable and timely access to customers’ premises, limit the economic feasibility of deploying alternative fiber facilities at most customer locations.¹⁵ This analysis cannot be squared with the virtual spaghetti bowl of competitive fiber that already has been deployed. The evidence before the Commission in the *Triennial Review* established that alternative fiber now is so widely deployed that competitors readily could extend their fiber networks to reach virtually any customer they seek to serve.¹⁶ ILECs therefore should not have been required to unbundle any dark fiber loop plant at all.

But even if the factors cited by the Commission could support unbundling of *existing* dark fiber loops for enterprise customers, they cannot justify requiring ILECs to unbundle any *new* fiber loop plant, irrespective of the customers served via such facilities. As the Commission itself recognized, ILECs and CLECs stand in the same shoes with respect to new investment. Both face the same operational and economic barriers to deployment of new fiber infrastructure – both must buy new fiber cables and equipment, negotiate access to rights of way, obtain

¹⁴ *Id.* ¶ 311.

¹⁵ *Id.* ¶¶ 311-14.

¹⁶ UNE Fact Report 2002, Section IV, CC Docket No. 01-338, et al. (Attach. A. to SBC Comments) (filed April 5, 2002).

government permits, and hire skilled labor.¹⁷ Indeed, as the Commission properly observed, CLECs may enjoy certain advantages over ILECs in deploying new fiber, including lower labor costs (which make up the largest component of construction costs) and state-of-the-art back office systems.¹⁸ In addition, the potential revenue opportunities from new fiber deployment are the same for both ILECs and CLECs.¹⁹ Any requirement that ILECs unbundle new dark fiber – even if only for use in serving enterprise customers – thus runs squarely into the Commission’s own conclusions with respect to new fiber investment. CLECs cannot be impaired without access to new fiber loop plant, and requiring unbundling of such new investment will substantially chill the ILECs’ incentive to deploy it.

The Commission’s apparent decision to require significant unbundling of new dark fiber loop plant in the enterprise market also runs afoul of section 706, which the Commission elsewhere properly recognizes should guide its unbundling determinations. Section 706 “directs the Commission ‘to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,’”²⁰ which, as the Commission recognized, will require “[u]pgrading telecommunications loop plant” by “replac[ing]. . . copper loops with fiber.”²¹ ILECs, however, will not deploy fiber in their loop plant if they are forced to share their investments with competitors. Section 706 thus supports elimination of any unbundling requirements for newly deployed fiber loop plant, regardless of whether such plant is an

¹⁷ *Id.* ¶¶ 240, 275.

¹⁸ *Id.* ¶ 240.

¹⁹ *Id.* ¶¶ 240, 274.

²⁰ *Id.* ¶ 242, citing 47 U.S.C. § 157 nt.

²¹ *Id.* ¶ 243.

extension of existing fiber or a wholly new facility, or lit or dark, and irrespective of the customers served by such plant.

Although SBC believes that no unbundling of *any* dark fiber loops is appropriate, the Commission should, at a minimum, resolve the analytical inconsistencies in the *Triennial Review Order* by narrowing any such requirement that may exist for enterprise customers to fiber loop plant that was deployed prior to the effective date of the *Triennial Review Order*. Implementing a new/old regulatory distinction for fiber loop plant would be easy from an administrative perspective. Manufacturers typically stamp manufacturing dates on fiber optic cable, and also have indicated that they easily could color code all fiber deployed after a date-certain (such as by changing the color of the sheath for fiber optic cables, or modifying the color of fiber strands). In addition, ILECs maintain property records in which they identify the date when fiber optic cable is placed into service. As a consequence, any newly deployed fiber loop plant could be readily identified not only through ILEC property records but also through examination of the loop plant itself, eliminating the risk of disputes over whether particular fiber loop plant is newly deployed. The Commission therefore should grant BellSouth's petition to eliminate unbundling of newly deployed fiber loop plant.

Finally, the Commission should clarify, as it did in the *UNE Remand Order*, that its dark fiber unbundling rules are not intended to disturb reasonable limitations on dark fiber unbundling (to the extent such unbundling is required by the Commission's rules) to preserve an ILEC's ability to provide service as a carrier of last resort.²² As the Commission previously has recognized, ILECs must reserve dark fiber spares to replace defective fibers or for other

²² *UNE Remand Order* ¶ 199.

maintenance purposes, as well as to meet near-term growth in demand, in order to fulfill their obligation to provide service as a carrier of last resort.²³ The Commission therefore should state clearly that an ILEC need not unbundle any existing dark fiber loop plant, to the extent required under the Commission's rules, if doing so would threaten an ILEC's ability to provide service as a carrier of last resort.

B. The Commission Should Make Clear that ILECs Need Not Design or Modify Their Next Generation Networks to Provide TDM Capability

In the *Triennial Review Order*, the Commission found that CLECs were not impaired without access to packet switching (including routers and DSLAMs), and that requiring ILECs to provide unbundled access to packet technology or any packetized transmission path would “blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized by section 706.”²⁴ It therefore relieved ILECs of any obligation to unbundle any packet technology in the loop and any packetized transmission path,²⁵ and limited unbundling of hybrid loops only to the non-packetized TDM capabilities of such loops, where such capabilities are already deployed.²⁶ The Commission further made clear that the states could not add to these unbundling obligations.²⁷

²³ *See id.*

²⁴ *Id.* ¶¶ 537, 288.

²⁵ *Id.* ¶¶ 537, 288.

²⁶ *Id.* ¶¶ 291, 294.

²⁷ *Id.* ¶ 187.

While CLECs thus are entitled to obtain access to TDM capabilities of hybrid loops only where such capability already exists or the ILEC routinely adds such capability to hybrid loops for its own retail customers,²⁸ CLECs may attempt to distort the Commission's network modification rules to require ILECs to add such capability to their next generation packet networks on demand. And the states may disregard the Commission's limits on unbundling those networks by requiring ILECs to design or reconfigure such networks to accommodate CLEC requests for access to TDM functionality, irrespective of whether the ILEC routinely adds such capability to hybrid loops for its own retail customers. Any such requirement would increase ILEC costs by forcing them to adopt inefficient next generation network designs, undermining their incentives to invest in the infrastructure necessary to provide broadband services.

SBC therefore supports BellSouth's request the Commission clarify through reiteration that ILECs can deploy their next generation networks in the most efficient manner possible, and in particular, that ILECs cannot be required to design, reconfigure or modify such networks solely to facilitate CLECs' requests for TDM capability.²⁹ The Commission further should clarify that its network modification rules do not require an ILEC to deploy a multiplexer that provides TDM functionality if an ILEC has not done so.³⁰ Finally, the Commission should clarify that an ILEC cannot be required to remove packet switching or packetized transmission

²⁸ *Id.* ¶ 632.

²⁹ *Bellsouth Petition* at 16-17.

³⁰ As BellSouth correctly observes, installing a TDM multiplexer at a location where an ILEC plans to deploy a packet-based network is not something an ILEC would do for its own customers, and would force an ILEC to provide access to an "unbuilt superior" network, contrary to the express limits of section 251(c)(3). *BellSouth Petition* at 17.

features from a loop to accommodate a CLEC request for access. Any such requirement would be flatly inconsistent with the congressionally mandated goal of encouraging ILECs to upgrade their networks to provide advanced services to all Americans. In order to remove any ambiguity regarding the scope of an ILEC's obligations to make available TDM features, functions and capabilities, and to modify their networks to accommodate CLECs' requests for access, the Commission should clarify its rules in accordance with Attachment A to this document.

II. THE COMMISSION SHOULD RECONSIDER ITS CONCLUSION THAT SECTION 271 OPERATES INDEPENDENTLY FROM THE UNBUNDLING REQUIREMENTS OF SECTION 251

SBC also supports BellSouth's request for reconsideration of the holding that Bell Operating Company ("BOC") "obligations under section 271 are not necessarily relieved based on any determination [the Commission] make[s] under the section 251 unbundling analysis."³¹ In fact, the Commission has consistently held that the scope of the unbundling obligations under the section 271 Competitive Checklist is no more extensive than the scope of those same obligations under section 251.³² That holding, moreover, is faithful both to the letter of section

³¹ *Triennial Review Order* ¶ 655.

³² See Memorandum Opinion and Order, *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, 17 FCC Rcd 26303, 26502-03, ¶¶ 358-359 (2002); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al., for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, 6361, ¶ 241 (2001), *aff'd in part and remanded*, *Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, 20775, ¶ 113 (2001), *aff'd*, *AT&T Corp. v. FCC*, No. 01-1511, 2002 WL 31558095 (D.C. Cir. Nov. 18, 2002) (*per curiam*); Memorandum Opinion and Order, *Application of Verizon New England Inc., et al., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, 9135, App. B, ¶ 1 (2001), *aff'd in part, dismissed in part, and remanded in part*, *WorldCom, Inc. v. FCC*, 308 F.3d 1 (D.C. Cir. 2002).

271 – which, as BellSouth again explains, was intended to provide market-opening requirements in the event an application for section 271 relief *preceded* Commission unbundling rules – and to the intent of Congress – which cannot be thought to have intended that the limits on unbundling in section 251(d)(2) applied *only* to the incumbent LECs that happen not to be Bell operating companies.

Indeed, to the extent the Commission concludes that there is no impairment with respect to a particular network element, it *cannot* continue requiring unbundling of that element, whether as a UNE under section 251 or an item on the section 271 Competitive Checklist. The D.C. Circuit made that crystal clear in its *USTA* decision, where it admonished the Commission for failing to take into account the social costs of forced sharing. Echoing Justice Breyer’s concurring opinion in *Iowa Utilities Board*, the D.C. Circuit found, in no uncertain terms, that “[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.”³³ The court held “nothing in the Act appears a license to the Commission to inflict on the economy [these costs] under conditions where it had no reason to think doing so would bring on a significant enhancement of competition.”³⁴ Since the predicate of a no-impairment finding under section 251 is a conclusion by the Commission that competitive entry is economically and operationally feasible without unbundling, it necessarily follows that unbundling in the absence of impairment would *not* bring on a significant enhancement of competition. In this respect, the Commission’s

³³ *United States Telecom Assoc. v. FCC*, 290 F.3d, 415, 427 (D.C. Cir. 2002)(emphasis added)(citations omitted).

³⁴ *Id.* at 429.

conclusion that section 271 unbundling obligations survive a finding of no impairment under sections 251 flies in the face of *USTA*.

It also is wholly illogical. Why would Congress have established the “impairment” test in the first instance if it independently intended to require unbundling under section 271? It is no answer to suggest that the pricing standards were different. Congress could not have known what pricing standards the Commission would apply to section 251 and 271 unbundling or even whether those standards would be different. Indeed, one would assume that theoretical constructs like TELRIC were completely foreign to Congress and wholly un contemplated. The *only* logical explanation is that the switching, loop, and transport unbundling obligations in section 271 were intended to apply in the event an application for section 271 relief *preceded* Commission unbundling rules. Accordingly, the Commission should grant BellSouth’s petition for reconsideration on this issue.

III. THE COMMISSION SHOULD CLARIFY ITS INTENT THAT ITEMS PROVIDED UNDER THE SECTION 271 COMPETITIVE CHECKLIST NEED NOT BE PROVIDED IN COMBINATION OR COMMINGLED WITH ANY OTHER SECTION 271 ITEMS OR WITH SECTION 251 UNES

In conjunction with its determination that sections 251 and 271 operate independently, the Commission expressly declined (in footnote 1990) to require BOCs to combine section 271 checklist items with UNES. Nevertheless, at the same time, paragraph 584 stated “we require that incumbent LECs permit commingling of UNES and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271[.]” In its *Errata*, the Commission attempted to resolve this conflict by removing the reference to section 271 from paragraph 584. However, the Commission also deleted the last sentence of footnote 1990. As it now stands, footnote 1990 states:

“[w]e decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271’s competitive checklist contain no mention of “combining” and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3).”

SBC believes that the Commission’s evident intent was to clarify that BOCs need not combine UNEs with section 271 checklist items. However, as modified, footnote 1990 conceivably could be read (however illogically) to relieve BOCs only of the obligation to combine two or more section 271 items. As BellSouth requests, the Commission therefore should clarify that section 271 Competitive Checklist items 4-6 or 10 need not be combined or commingled with each other or with UNEs.

IV. THE COMMISSION SHOULD DENY THE WIRELESS CARRIERS’ PETITIONS FOR RECONSIDERATION

Three aspects of the *Triennial Review Order* impact the ability of CMRS carriers to obtain UNEs. First, in a single sentence—for the first time ever and without conducting any impairment analysis—the Commission declared that CMRS carriers in certain circumstances “qualify for access to UNEs.”³⁵ The sole basis for this decision was the Commission’s determination—inconsistent with its incorrect finding later that wireless is not a “suitable substitute” for wireline local services—³⁶ that CMRS service “is used to compete against telecommunications services that have been traditionally within the exclusive or primary domain of incumbent LEC services.”³⁷

³⁵ *Triennial Review Order* ¶ 140.

³⁶ *Triennial Review Order* ¶ 445.

³⁷ *Triennial Review Order* ¶ 140.

Second, the Commission redefined the ILECs' obligation to provide unbundled dedicated transport under section 251 of the Act. Specifically, the Commission determined that its "previous definition [of unbundled transport] was overly broad."³⁸ Acknowledging that nothing in the Act *extends* an ILEC's unbundling obligation to facilities that are *outside* of its local exchange network, the Commission held that "a more reasonable and narrowly-tailored definition of the dedicated transport network element includes only those transmission facilities *within* an incumbent LEC's transport network."³⁹ Thus, although the Commission refused to allow CMRS carriers access to unbundled entrance facilities,⁴⁰ it concluded—once again, for the first time ever and without any analysis—that CMRS carriers, "will have the ability to access transport facilities *within* the incumbent LEC's network, pursuant to section 251(c)(3)."⁴¹

Finally, the Commission established certain eligibility criteria for access to combinations of high capacity loops or channel terminations with dedicated transport. The purpose of these criteria were to limit the circumstances in which carriers could substitute UNEs for special access services.⁴² Thus, in order to combine unbundled dedicated transport with an entrance

³⁸ *Triennial Review Order* ¶ 365.

³⁹ *Id.* ¶ 366.

⁴⁰ *Id.* n. 1116. In doing so, the Commission did not question that entrance facilities and other inter-network transport facilities are "network elements" within the meaning of the statutory definition; that is, that such facilities constitute "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29). Rather, the FCC determined that the ILECs' *obligation to provide access* to network elements under section 251(c)(3) should not be read to extend to transmission facilities that an ILEC might deploy "*outside* the incumbent LEC's local network." *Triennial Review Order* ¶ 366.

⁴¹ *Triennial Review Order* ¶ 368.

⁴² *Triennial Review Order* ¶ 591.

facility, CMRS carriers must satisfy the Commission's eligibility criteria, which include both service as well as architectural components.⁴³

CMRS carriers now challenge two components of the Commission's decision. First, they ask the Commission to reconsider its decision not to require ILECs to unbundle entrance facilities.⁴⁴ Second, they ask the Commission to change its service eligibility rules such that they would not apply to wireless carriers.⁴⁵ In effect, the CMRS carriers request that the Commission provide for a wholesale conversion of the special access services they use to UNEs. The Commission should deny the CMRS carriers' requests. As an initial matter, given that the Commission has permitted CMRS providers to obtain UNEs without even conducting an impairment analysis, the *last* thing the Commission should do on reconsideration is expand their access to UNEs.⁴⁶ In any event, even overlooking this glaring error, the CMRS carriers' petitions fail in their own right.

⁴³ In its *Errata* issued September 17, 2003, the Commission made clear that its eligibility requirements apply to any combination of high capacity facilities and services. Thus, in order for a carrier to combine any DS1 or DS3 UNE (loop or transport) with any other high capacity facility (UNE or non-UNE), it must satisfy the eligibility criteria.

⁴⁴ See, e.g., *CTIA Petition* at 1.

⁴⁵ See, e.g., *id.* at 1-2.

⁴⁶ As noted, the Commission gave CMRS providers access to UNEs based solely on its conclusion that CMRS service is used to compete against services traditionally provided by incumbent LECs and without conducting the required impairment analysis. Had the Commission conducted this analysis, as it was required to do by law, it necessarily would have concluded that CMRS providers are *not* impaired without access to UNEs. There is no dispute that wireless is a highly competitive market. See, e.g., *Eighth CMRS Report*, WT Dkt. No. 02-379, FCC 03-150, ¶ 17 (July 14, 2003). Indeed, the *Triennial Review Order* itself acknowledges that “[w]ireless telephone subscriber growth for the mass market has been remarkable,” *Triennial Review Order* ¶ 53, and the CMRS carriers in their reconsideration petitions trumpet the competitive “intermodal success story” of their wireless service—both as to wireless itself *and* as a competitive alternative to wireline service. See *T-Mobile Petition* at 6; see also *id.* at 1-2; *CTIA Petition* at 2; *Nextel Petition* at 1-2. The very presence of this vibrant competition for

A. The Commission Should Not Require Unbundling of CMRS Entrance Facilities

In the *Triennial Review Order*, the Commission declined to require unbundling of entrance facilities, reasoning that those facilities are *outside* of incumbent LEC networks and that the Act requires unbundling only of those facilities that are *within* an ILEC's network.⁴⁷ In addition, it found that “the economics of dedicated facilities used for backhaul between networks are sufficiently different from transport within an incumbent LEC's Network.”⁴⁸ Certain CMRS carriers and their trade association ask the Commission to reconsider this decision to exclude their entrance facilities from unbundling. They claim, in this regard, that the economics of CMRS entrance facilities are different than the economics of CLEC facilities and that CMRS entrance facilities resemble loops rather than transport. Based on these claims, the CMRS carriers urge the Commission to change either its definition of unbundled loops or unbundled transport to include CMRS entrance facilities. These arguments are both irrelevant and factually incorrect. .

wireless service—without the use of UNEs—should lead directly to the conclusion that wireless carriers are, in fact, not impaired without access to UNEs.

⁴⁷ *Triennial Review Order* ¶ 366.

⁴⁸ *Id.* ¶ 367. Specifically, the Commission focused on three differences between facilities within and outside an ILEC's network. First, because a requesting carrier has control over its network design and the location of its switches, it can “choose to locate its switch very close to an incumbent LEC wire center to minimize costs associated with deploying fiber,” or it can locate its switch “near other competing carriers to share costs, or near existing competitive fiber.” *Id.* Second, because “transmission facilities used for backhaul . . . often represent the point of greatest aggregation of traffic . . . carriers are more likely to self-deploy such facilities.” *Id.* Third, the new definition “encourages competing carriers to incorporate those costs within their control into their network deployment strategies.” *Id.* In addition, the FCC noted that inter-network transport is “the most competitive type of transport” and that a broader definition of the network element might “delay the further development of intermodal solutions.” *Id.* nn. 1122, 1123.

First and foremost, to the extent CMRS carriers focus their petitions on the nomenclature and definitions of various facilities,⁴⁹ they lose sight of—and thus never address—the fundamental reason the Commission decided not to unbundle entrance facilities—that those facilities are not part of the incumbent LECs’ networks and thus not required to be unbundled under the Act. Their claims regarding the technical and economic characteristics of their entrance facilities are thus wholly beside the point. Indeed, when CMRS carriers refer to entrance facilities as “last mile” facilities, what they mean is the last mile of their *wireless networks*.⁵⁰ *A fortiori*, entrance facilities are not a part of ILEC networks, and, as the Commission properly determined, are not required to be unbundled under the Act, irrespective of whether they are similar in some respects to loops.⁵¹

In any event, their claims regarding the economic and technical characteristics of their entrance facilities are incorrect. For example, there is no basis for the CMRS carriers’ claims that the Commission’s economic rationale for eliminating unbundling of entrance facilities does not apply to CMRS networks. The CMRS carriers assert that because of “spectrum considerations,” “customer concentration,” “topography,” and “local zoning,” they do not have the same freedom to choose the location of their base stations that CLECs have in choosing the locations of their

⁴⁹ See, e.g. *AT&T Wireless Petition* at 2; *Nextel Petition* at 3;

⁵⁰ See *AT&T Wireless Petition* at 9.

⁵¹ Nextel’s assertion to the contrary rests upon a distortion of the Commission’s rules. See *Nextel Petition* at 13-15. Nextel appears to address the instance in which a route from one its switching centers to its base stations runs between two or more ILEC wire centers before going from an ILEC wire center to the base station. Definitionally, the facility between the ILEC wire centers is still interoffice transport under the Commission’s rules, and is still a UNE. The question, however, would be whether under the Commission’s eligibility requirements Nextel is able to combine that interoffice transport UNE with the special access entrance facility to the Nextel base station. That is a different question, and is addressed below in the discussion of the Commission’s eligibility requirements.

switches.⁵² That hardly means, however, that, from their perspective, entrance facilities are indistinguishable from interoffice transport facilities. As with CLECs, CMRS carriers “control, in part, how they design and locate their networks, as opposed to obtaining a connection between two incumbent LEC wire centers.”⁵³ That they may not have the same degree of control as CLECs does not alter the fundamental conclusion that they have more control over the location of their own facilities than ILEC interoffice facilities. Similarly, the fact that CMRS entrance facilities may not represent the *greatest* point of traffic aggregation does not invalidate the Commission’s reasoning. Clearly, CMRS entrance facilities represent a considerable amount of traffic aggregation from CMRS base stations, which distinguish entrance facilities from loops. Most importantly, eliminating unbundling of entrance facilities will encourage CMRS carriers to “incorporate those costs within their control into their network deployment strategies rather than to rely exclusively on the incumbent LEC’s network.”⁵⁴

CMRS carriers also claim that they have no choice but to obtain entrance facilities from ILECs.⁵⁵ There is no reason, however, that CMRS carriers can not self-deploy entrance facilities to their wireless base stations or obtain such facilities from third parties. ILECs have no special advantage in providing services or facilities to wireless base stations, or, indeed, to any locations outside their networks. The only difference between ILECs and other providers is that ILECs are required to provide such services under their special access tariffs, and, even after the *Triennial*

⁵² See *CTIA Petition* at 4; *AT&T Wireless Petition* at 5.

⁵³ *Triennial Review Order* ¶ 367.

⁵⁴ *Triennial Review Order* ¶ 367.

⁵⁵ See, e.g., *AT&T Wireless Petition* at 2, 6; *Nextel Petition* at 2.

Review Order, CMRS carriers will still have the ability to obtain entrance facilities as special access.

Finally, the architectural arguments raised by the CMRS carriers fail to support their request that the Commission re-write its UNE definitions. The CMRS carriers claim that a wireless base station is the functional equivalent of a PBX and that the entrance facility to a wireless base station is akin to a loop that terminates to an end user's PBX.⁵⁶ Therefore, according to the CMRS carriers, the Commission should change its definition of loops to include the facilities that connect an ILEC wire center and CMRS base stations. The comparison, however, of a wireless base station to a PBX—and the entrance facility that terminates at a wireless base station to a loop that terminates at a PBX—is inapposite.

It is not correct that “the base station performs a function similar to that of a traditional [PBX], terminating traffic received from the incumbent LEC wireline network and assigning each call to the proper wireless channel.”⁵⁷ A base station does not assign calls to an available channel. Rather, the intelligence for the base station resides in the mobile switching center (*i.e.*, the switch), and it is the mobile switching center that controls functions such as channel selection, call set up and call hand off. In that sense the facility from an ILEC wire center to a wireless base station is very much like CLEC backhaul facilities. Indeed, in this very proceeding AT&T Wireless told the commission that it needed such facilities “for the purpose of backhauling traffic.”⁵⁸

⁵⁶ See, *e.g.*, *CTIA Petition* at 5; *Nextel Petition* at 9.

⁵⁷ *T-Mobile Petition* at 11.

⁵⁸ Letter from Douglas I. Branuch, Vice President, External Affairs and Law, AT&T Wireless to Marlene H. Dortch, Secretary (February 5, 2003) at 2-3.

In addition, a PBX allows end users attached to that PBX to call and talk to each other without ever having to “dial out” of the PBX. Thus, to get an “outside line,” PBX users typically have to dial an additional number, usually a 9, and, if a loop is disconnected from a PBX, customers on the lines served by that PBX are still able to talk to each other. A wireless base station, on the other hand, does not allow wireless customers served by that base station to communicate with each other. A base station separated from a mobile switching center would stand idle and would be unable to process any calls. Moreover, as the CMRS carriers themselves admit, unlike loops (even loops that terminate at a PBX), CMRS carriers “do not assign a local number to the transmission facility terminating at the cell site.”⁵⁹ Thus, even with respect to the technical functions performed by entrance facilities to wireless base stations, there is no basis for defining such facilities as loops. In short, CMRS carriers are not impaired without unbundled access to entrance facilities, and the Commission should deny their petitions for reconsideration.

B. The Commission Should Deny the CMRS Carriers’ Request that the Commission Reconsider its Decision to Apply its Eligibility Requirements to CMRS Carriers

For the first time ever, the Commission in the *Triennial Review Order* permitted CMRS carriers access to UNEs, and, in particular, to unbundled dedicated transport.⁶⁰ As a result, CMRS carriers will now have the potential to “convert that interoffice component of their special

⁵⁹ *AT&T Wireless Petition* at 16.

⁶⁰ The Commission did not declare, as the CMRS carriers blithely assert, that they “always have been” eligible to obtain unbundled dedicated transport, or any other UNE. *AT&T Wireless Petition* at 12; *CTIA Petition* at 3; *Nextel Petition* at 15. Nextel relies upon this assertion to request that the Commission reconsider its denial of a fresh look period for wireless carrier special access contracts. *Nextel Petition* at 15-16. The Commission should deny that request out of hand.

access circuits” to unbundled dedicated transport UNEs.⁶¹ The only safeguard preventing wholesale arbitrage by CMRS carriers converting interoffice special access circuits to UNEs are the Commission’s eligibility criteria.⁶²

The CMRS carriers assert that because they are different than wireline carriers, the Commission’s eligibility requirements for high capacity combinations should not apply to them.⁶³ There is no basis, however, for the Commission to create such a special dispensation for CMRS carriers. As an initial matter, CMRS carriers are not denied the ability to purchase combinations of high capacity facilities as a result of the eligibility requirements. If CMRS carriers are unable to satisfy the eligibility requirements, they may still purchase the complete set of services they need as special access. CMRS carriers have provided no evidence that special access services are insufficient for their needs or impair their ability to provide competitive CMRS service.

Moreover, the breadth of the eligibility requirements is a reasonable means of protecting against arbitrage and gaming. In effect, the CMRS carriers argue that the Commission should craft its UNE analyses to reflect the different architectures of wireless networks. Differences between CMRS and competitive wireline services networks, however, should not be used to allow CMRS carriers the benefits provided to wireline competitors but none of the constraints imposed on them to prevent abuse. CMRS carriers can not claim access to UNEs under the general eligibility criteria applicable to all carriers and also claim immunity from the limitations on that entitlement because they are different than other carriers. Indeed, if anything, any such

⁶¹ *AT&T Wireless Petition* at 12.

⁶² 48 C.F.R. § 51.318.

⁶³ *See CTIA Petition* at 7; *Nextel Petition* at 12.

differences should require a separate impairment analysis for CMRS. The Commission's failure to conduct a CMRS specific analysis should not be used as a bootstrap for further allowing CMRS carriers additional benefits.⁶⁴

V. THE COMMISSION SHOULD DENY EARTHLINK'S PETITION FOR RECONSIDERATION OF THE COMMISSION'S LINE SHARING DECISION

Notwithstanding the Commission's adherence to The D.C. Circuit's mandate, Earthlink requests that the Commission reinstate its line sharing rules. Earthlink, however, fails to address the core principle underlying the *USTA* decision and the Commission's *Triennial Review Order*—that in the face of the overall competitive picture for broadband services, line sharing will not bring about any significant competitive benefits, and any benefits it may provide are outweighed by the competitive harms caused by mandatory unbundling.⁶⁵ Accordingly, the Commission should deny Earthlink's petition.

A. The Commission Correctly Determined that the Costs of Line Sharing Outweigh its Minimal Competitive Benefits

⁶⁴ Ironically, Nextel argues, "To be faithful to the market-opening provisions of the 1996 Act, the Commission's UNE rules should not permit any bias against any particular technology that carriers might use to compete with ILECs." *Nextel Petition* at 8. But that is precisely what Nextel and the other CMRS carriers want the Commission to do. The Commission's current rules apply with equal force to wireline and wireline carriers, but the CMRS carriers would have the Commission create special dispensation from those rules for wireless carriers because their network architectures are different.

⁶⁵ In Addition to eliminating its line sharing rules, the Commission adopted a generous transition mechanism to give CLECs "adequate time to implement new internal processes and procedures, design new product offerings, and negotiate new arrangements with incumbent LECs to replace line sharing." *Triennial Review Order* ¶ 264. Earthlink complains that the Commission should not have eliminated line sharing until a process could be developed for transitioning customers from one DSL provider to another. *Earthlink Petition* at 13-14. Earthlink, however, provides no evidence of any customer disruptions caused by current processes for migrating customers among DSL providers. More fundamentally, the lack of such a transition process does not provide the Commission *carte blanche* to ignore the mandate of *USTA* and eliminate line sharing.

The Commission’s determination that the costs of requiring the unbundling of the high-frequency portion of the local loop outweigh any alleged benefit was compelled by the evidence compiled in this proceeding. The Commission has repeatedly found that DSL service competes with cable in the broadband market, and it is *cable* that is the dominant broadband service provider. In such circumstances, re-imposition of a line-sharing obligation would bring no significant benefit to broadband competition. Instead, it would affirmatively harm competition by imposing inefficiencies on the minority provider. It would accordingly be unlawful under *USTA* to force local telephone companies to surrender their network facilities simply to permit a CLEC to use those same facilities to provide its own broadband service.⁶⁶

Earthlink’s sole response is that “ISPs by and large do not have access to the cable modem platform.”⁶⁷ Earthlink, however, never demonstrates that line sharing is necessary for consumer broadband choices. The Commission, giving effect to the D.C. Circuit’s analysis in *USTA*, held that it could not order line sharing unless it found that there would be a significant benefit to competition *in the broadband market*. Given the Commission’s finding that

⁶⁶ Earthlink’s assertion that *USTA* “expressly anticipates” reinstatement of line sharing is preposterous. *Earthlink Petition* at 9. First, Earthlink omits the final phrase of the sentence on which it relies for its claim, in which the D.C. Circuit said, “Obviously any order unbundling the high frequency portion of the loop should also not be tainted by the sort of error *identified in our discussion of the [UNE Remand Order] and identified by petitioners here as well.*” *USTA*, 290 F.3d at 429 (emphasis added). Rather than contemplate reinstatement of line sharing, the D.C. Circuit merely indicated an alternative ground for invalidating the Commission’s line sharing order -- i.e., all of the infirmities of the *UNE Remand Order* discussed earlier in the *USTA* decision. Moreover, given the Commission’s finding in the *Triennial Review Order* of the same overall competitive situation before the Court in *USTA*—i.e., the dominance of cable modem service—and the D.C. Circuit’s description of the statutory authority relied on by the Commission for its *Line Sharing Order* as “quite unreasonable,” *id.*, it is unthinkable that the D.C. Circuit contemplated anything other than invalidation of line sharing.

⁶⁷ *Earthlink Petition* at 8.

intermodal competition, particularly from cable modem providers, ensures vigorous broadband competition, the Commission plainly could not find that the impairment standard of 47 U.S.C. § 251(d)(2) was met.⁶⁸

In light of that core determination, the Commission could *not* have ordered local telephone companies to engage in line sharing; indeed, the analysis calls into question any requirements that are designed solely to enable requesting carriers to provide broadband service. In any event, the Commission did not limit its analysis to this point, but also offered two additional reasons for reversing its determination, in the *Line Sharing Order*,⁶⁹ that CLECs would be impaired without access to line sharing. First, the Commission found that it was inappropriate to “focus . . . only on the revenues derived from an individual service” rather than on “all potential revenues derived from using the full functionality of the loop.”⁷⁰ CLECs are not impaired if they have access to the stand-alone loop – as they do under the *Triennial Review Order*,⁷¹ —because any increased costs “are offset by the increased revenue opportunities

⁶⁸ Moreover, the Commission’s finding with respect to cable modem service was not inconsistent with statements in its general enunciation of its impairment standard. See *Earthlink Petition* at 8-9. The Commission was clear that in appropriate circumstances, it would “give weight to deployment of intermodal alternatives” in its analysis, and that the “presence of intermodal alternatives can be just as probative of a lack of impairment as the presence of traditional wireline ‘telephone’ deployment.” *Triennial Review Order* ¶ 97.

⁶⁹ Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) (“*Line Sharing Order*”), *vacated and remanded*, *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

⁷⁰ *Triennial Review Order* ¶ 258.

⁷¹ See *id.* ¶ 260.

afforded by the whole loop” — including voice, data, voice over DSL, and video services.⁷² The Commission also found that requiring incumbents to provide access to the whole loop “creates better competitive incentives” than requiring separate unbundling of the high-frequency portion of the loop.⁷³ Second, the Commission observed that competitive DSL providers can provide data service in cooperation with a competitive voice provider – an arrangement known as “line splitting” – noting that Covad had just announced plans “to offer ADSL service to ‘more of AT&T’s 50 million consumer customers’” through such arrangements.⁷⁴ In addition to missing the fundamental rationale underlying the Commission’s decision, Earthlink’s challenges to both these conclusions are unavailing.

Earthlink complains that the revenue opportunities from video services are “speculative,” and that the Commission, therefore, erred in considering such revenues associated with the local loop.⁷⁵ As an initial matter, as discussed above, the Commission need not have reached this issue at all because it properly determined that requiring line-sharing would be unlawful, whether or not individual providers can pursue other avenues. But, even considering Earthlink’s argument, the Commission’s consideration of all revenues associated with the local loop is fully consistent with its overall impairment standard.⁷⁶ That video revenue might be speculative does not disprove the prospect of such revenue, and it certainly does not prove impairment in the

⁷² *Id.* ¶ 258.

⁷³ *Id.* ¶ 260.

⁷⁴ *Id.* ¶ 259.

⁷⁵ *Earthlink Petition* at 7.

⁷⁶ *Triennial Review Order* ¶ 84.

absence of access to line sharing. Perhaps more obviously, it ignores the prospect of obtaining revenue from voice and additional data revenues over a local loop.

That prospect is reinforced by the Commission's additional conclusion that line splitting—a bundled package of CLEC voice and data services—provides a viable alternative for broadband providers that do not wish to provide voice service.⁷⁷ Earthlink's data CLEC partner, Covad, has made public statements that line splitting provides a viable commercial strategy.⁷⁸ Indeed, Covad has continued to tout line-splitting arrangements it has reached with a variety of carriers as allowing Covad to “‘stay in the consumer business.’”⁷⁹ In announcing one recent line-splitting deal, Covad stated that such arrangements “‘demonstrate[] our continued execution of our business strategy to sign up both national and regional line-splitting partners and capitalize on the growing demand for bundled voice and data services.’”⁸⁰ Covad insisted that “[i]t's not that we've artificially created this market to escape the FCC' 'We're taking advantage of an already existing market.’”⁸¹ Covad declared that it is “‘in a unique position *to continue*

⁷⁷ *Id.*

⁷⁸ See Order ¶¶ 259 & n.767 (finding that “Covad's argument that . . . there are no third-party alternatives” to line sharing was not “credible”).

⁷⁹ See Paul Davidson, *AT&T Will Bundle Broadband with Phone Service Plan to Rival Regional Bells*, USA Today, July 30, 2003, at B3 (quoting CEO Charles Hoffman); see also Reuters, *MCI and Covad Sign Voice/Data Bundling Deal*, Sept. 2, 2003.

⁸⁰ Press Release, *VarTec and Excel Select Covad DSL for Their Local/Long Distance Voice and Data Bundles*, Aug. 28, 2003.

⁸¹ Kevin Fitchard, *Covad Signs Line-Splitting Deal with Z-Tel*, TelephonyOnline.com, Aug. 7, 2003.

driving increased DSL adoption throughout the United States’” because of the availability of line splitting.⁸²

Earthlink also argues that there are operational problems that prevent linesplitting from serving as a “basis for eliminating the line sharing UNE.”⁸³ The sole support for Earthlink’s claim are self-serving regulatory statements made by MCI and other data CLECs. Moreover, Earthlink’s claim contradicts Covad’s public statements, in which it has argued that it will continue to serve the consumer market through line splitting and in which it has told its investors that line splitting represents a viable business strategy. In any event, none of the complaints that Earthlink raises concerning incumbents’ Operations Support Systems (“OSS”) for line splitting gives any reason to question the Commission’s basic conclusion that the availability of line splitting permits broadband providers to enter the market without independently developing a circuit-switched voice capability – even if they cannot efficiently utilize the stand-alone loop.

It may be that “the need for line splitting is likely to grow”⁸⁴ and that, as a result, carriers will engage in collaborative efforts to develop new and improved OSS as needed.⁸⁵ But, precisely because the Commission’s unbundling rules permit line splitting and have required ILECs “to implement, in a timely fashion, practical and reasonable measures to enable competitive LECs to line split”⁸⁶ Earthlink’s complaints about line-splitting implementation cannot undermine the Commission’s finding of non-impairment. Moreover, there is simply no

⁸² TR Daily, Sept. 2, 2003 (emphasis added).

⁸³ *Earthlink Petition* at 11.

⁸⁴ (*Order* ¶ 259 n.771).

⁸⁵ *See id.* ¶ 252 & n.752.

⁸⁶ *Id.* n.752 (internal quotation marks omitted).

evidence in the record to support Earthlink's claim that line splitting has not been effectively implemented to date, much less that such implementation is so technically daunting that it *cannot* be implemented. Indeed, to the extent they have addressed this issue, all of the Commission's section 271 orders have expressly found that incumbents have complied with their obligation to allow line splitting.⁸⁷

B. The Commission's Line Sharing Decision Does Not Violate the APA

Earthlink's additional claim that the Commission's determination on line sharing represents a compromise among the Commissioners provides no basis for relief. The Commission's decision not to re-impose the line-sharing obligation is both justified by the reasons contained in the *Triennial Review Order* and supported by evidence in the record; that is what the Administrative Procedure Act requires.⁸⁸ Notably, Covad assured the Commission that

⁸⁷ See, e.g., *SBC Michigan Orders* ¶ 134; *Qwest Minnesota Order*, 18 FCC Rcd 13323, ¶ 53 (2003); *Qwest New Mexico/Oregon/South Dakota Order*, 18 FCC Rcd 7325, ¶ 93 (2003); *SBC Nevada Order*, 18 FCC Rcd 7196, ¶ 65 (2003); *Verizon Maryland/D.C./West Virginia Order*, 18 FCC Rcd 5212, ¶ 119 (2003); *Qwest Nine State Order*, 17 FCC Rcd 26303, ¶ 355 (2002); *SBC California Order*, 17 FCC Rcd 25650, ¶ 132 (2002); *BellSouth Florida/Tennessee Order*, 17 FCC Rcd 25828, ¶ 132 (2002); *Verizon Virginia Order*, 17 FCC Rcd 21880, ¶ 138 (2002); *Verizon New Hampshire/Delaware Order*, 17 FCC Rcd 18660, ¶ 105 (2002); *BellSouth Five State Order*, 17 FCC Rcd 17595, ¶¶ 164, 232 (2002); *id.* ¶ 251 ("competitive LECs have raised no complaints" about BellSouth's line-splitting OSS); *Verizon New Jersey Order*, 17 FCC Rcd 12275, ¶¶ 135 (2002) ("Verizon's ordering process for line splitting in New Jersey allows efficient competitors a meaningful opportunity to compete"), 153; *Verizon Maine Order*, 17 FCC Rcd 11659, ¶ 51 (2002); *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd 9018, ¶ 243 (2002); *Verizon Vermont Order*, 17 FCC Rcd 7625, ¶ 55 (2002), *appeal dismissed*, *AT&T Corp. v. FCC*, No. 02-1152, 2002 WL 31619058 (D.C. Cir. Nov. 19, 2002); *Verizon Rhode Island Order*, 17 FCC Rcd 3300, ¶ 90 (2002); *SBC Arkansas/Missouri Order*, 16 FCC Rcd 20719, ¶ 106 (2001), *aff'd*, *AT&T Corp. v. FCC*, No. 01-1511, 2002 WL 31558095 (D.C. Cir. Nov. 18, 2002) (per curiam); *Verizon Pennsylvania Order*, 16 FCC Rcd 17419, ¶ 89 (2001), *aff'd*, *Z-Tel Communications, Inc. v. FCC*, 333 F.3d 262 (D.C. Cir. 2003).

⁸⁸ See *United Steelworkers v. Marshall*, 647 F.2d 1189, 1216 (D.C. Cir. 1980) ("[w]e rest our decision not on our own theory of agency management, but on the state of the law.").

any concerns it expressed in its stay petition before the agency about political compromises that the FCC reached were not “germane to [its] stay request.”⁸⁹ The Commission’s line sharing decision was procedurally proper, and the Commission should deny Earthlink’s petition for reconsideration of that decision.

VI. THE COMMISSION SHOULD REJECT TSI’S SUBMISSION

On October 3, 2003, TSI Telecommunications Services, Inc. (“TSI”) submitted a letter to the Commission, which the Commission’s Public notice included in its list of petitions for reconsideration on which the Commission seeks comment. TSI did not participate in the proceedings leading up to the *Triennial Review Order*, and as near as SBC can determine, the issue addressed by TSI in its letter (concerning signaling and call related databases) was not presented to the Commission during the course of the proceedings and thus not addressed in the *Triennial Review Order*. Moreover, even if it had been an issue in the *Triennial Review Order*, TSI submitted its letter beyond the time required for petitions for reconsideration.

Moreover, as for the substance of its argument, the Commission has already determined that TSI plainly is not a “requesting telecommunications carrier” under the Act, and ILECs have no obligation under sections 251, 252, or 271 to provide signaling or call related databases to TSI, at TELRIC or any other price.⁹⁰ As discussed above, SBC agrees with TSI that items not required as UNEs under section 251 should not be required under the Competitive Checklist of

⁸⁹Emergency Joint Petition for Stay by the Choice Coalition at 26, CC Docket Nos. 01-338 *et al.* (FCC filed Aug. 27, 2003). Nor is the *Triennial Review Order* the result of inappropriate *ex parte* communications. None of the *ex parte* communications that occurred after February 20, 2003, violated the Commission’s *ex parte* rules, the purpose of which is to ensure compliance with the APA.

⁹⁰ Memorandum Opinion and Order, *In the Matter of Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for*

section 271. Aside from that proposition, however, TSI's arguments have no basis in the Act. Accordingly, and for the procedural reasons discussed above, assuming that TSI's letter is a petition for reconsideration, it should be denied.

Authorization To Provide In-Region, InterLATA Services in Michigan, FCC No. 03-228, WC Docket No. 03-138 ¶ 160 (Sept. 17, 2003).

CONCLUSION

The Commission should deny the Petitions for Reconsideration filed by the CMRS carriers, Earthlink, and TSI. It should grant the Petitions for Reconsideration filed by BellSouth, SureWest, and the US Internet Association.

Respectfully submitted,

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ATTACHMENT A

SUGGESTED REVISIONS TO COMMISSION BROADBAND/FIBER RULES

- The Commission should revise section 51.319(a)(6) of its rules as follows:

(6) Dark fiber loops. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to an *existing* dark fiber loop on an unbundled basis except *for fiber-to-the-home loops as defined in paragraph (a)(3) of this section* or where a state commission has found, through application of the self-provisioning trigger in paragraph (a)(6)(i) of this section or the potential deployment analysis in paragraph (a)(6)(ii) of this section, that requesting telecommunications carriers are not impaired without access to a dark fiber loop at a specific customer location. Dark fiber is fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services. *An existing dark fiber loop is a fiber loop that an incumbent LEC purchased or deployed prior to the effective date of the Commission's.*
- The Commission should clarify the hybrid loop provisions of 51.319(a)(2) as follows:

(ii) Broadband services. When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide the requesting telecommunications carrier with nondiscriminatory access to *any* time division multiplexing features, functions, and capabilities of that hybrid loop, including DS1 or DS3 capacity (where impairment has been found to exist), on an unbundled basis to establish a complete non-packetized transmission path between the incumbent LEC's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the hybrid loop that are not used to transmit packetized information. *This access shall not include packetized transmission paths or the obligation to deploy time division multiplexing-based features, functions and capabilities where the incumbent LEC has not already done so.*

(iii) Narrowband services. When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of narrowband services, the incumbent LEC may either:

 - (A) Provide nondiscriminatory access, on an unbundled basis, to an entire hybrid loop capable of voice-grade service (i.e., equivalent to DS0 capacity) to the extent *a non-packetized transmission path* that uses time division multiplexing technology *has been deployed*; or
 - (B) Provide nondiscriminatory access to a spare home-run copper loop serving that customer on an unbundled basis.

- The Commission should clarify the engineering practices provision of 51.319(a)(9) as follows:

(9) Engineering policies, practices and procedures. An incumbent LEC shall not engineer the transmission capabilities of its network in a manner, or engage in any policy, practice, or procedure, that disrupts or degrades access to a local loop or subloop, including the time division multiplexing-based features, functions and capabilities of a hybrid loop, for which a requesting carrier may obtain or has obtained access pursuant to paragraph (a) of this section. *The requirements of this paragraph shall not be read to require an incumbent LEC to deploy time division multiplexing-based features, functions and capabilities with any copper or fiber packetized transmission facility to the extent it has not already done so, or to reconfigure a copper or fiber packetized transmission facility to provide time division multiplexing-based features, functions and capabilities; or to prohibit an incumbent LEC from upgrading a customer from a TDM-based service to a packet switched or packet transmission service, or removing copper loops from their plant, provided they comply with the network notification requirements of this section.*

- The Commission should clarify the routine network modification provision of 51.319(a)(8) as follows:

(ii) A routine network modification is an activity that an incumbent LEC regularly undertakes for its own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to activate such loop for its own customer. They also include activities needed to enable a requesting telecommunications carrier to obtain access to a dark fiber loop. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the construction of a new loop; []the installation of new aerial or buried cable[]; *removing or reconfiguring packet switching equipment or equipment used to provision a packetized transmission path; breaking open existing cables where splicing closures do not already exist for that cable; placing new splicing closures or termination points, pulling cable into conduits or entrance facility ducts; or negotiating building access, including entrance facility ducts or building space, for a requesting telecommunications carrier.*